Gurdit Singh

Vs

Mst. Angrez Kaur Alias Gej Kaur Alias Malan and Others

Civil Appeal No. 852 of 1964

(CJI K. N. Wanchoo, V. Bhargava, G. K. Mitter JJ)

25.04.1967

JUDGMENT

BHARGAVA, J.

This appeal has come up as a result of a dispute relating to succession to the property of one Sunder Singh. Sunder Singh, on 4th November, 1950, executed a will in respect of his property in favour of his niece, Udham Kaur. Subsequently, on 27th October, 1951, one Tarlok Singh executed a document divorcing his wife, Mst, Angrez Kaur, respondent No. 1 in this appeal, on the ground that she whenever he made enquiries from her, she became furious with him. In the document, he recited that Mst. Angrez Kaur was no longer his wife and that she had gone to live with Sunder Singh. According to respondent No. 1 on this divorce being granted to her by her first husband, Tarlok Singh, She was married to Sunder Singh by a custom, known as 'Chadar Andazi'. On 12th December, 1954, mutation of the property left by Sunder Singh was sanctioned in favour of Gurdit Singh by the authorities. Thereupon, Mst. Angrez Kaur field a suit on 17th March, 1955, claiming the property as window of Sunder Singh. The trial Court decreed the suit, holding that respondent No. 1 had married Sunder Singh by 'Chadar Andazi' and the marriage was valid. On appeal, the Additional District Judge set aside the decree of the trial Court and held that the marriage of Mst. Angrez Kaur with Sunder Singh during the life-time of her first husband, Tarlok Singh, was invalid and was not justified by any custom and, consequently, she could not be treated as the widow of Sunder Singh. Respondent No. 1, thereupon, appealed to the High Court of Punjab and the learned Judge, who heard the appeal. felt that the question of custom has not properly tried by the trial Court and the first appellate Court. Consequently he framed the following issues :-

> "Is there any custom amongst the tribes of the parties according to which the divorce given by Tarlok Singh to Mst. Angrez Kaur is recognised enabling her to enter into a valid marriage by Chadar Andazi with Sunder Singh? " This issue was remitted to the trial Court for recording a finding after giving the parties an opportunity lead further evidence. Further evidence was led in the trial Court which answered this issue in the negative and against respondent No. 1. The District Judge, in his report, endorsed view of the trial Court. The High Court, however, held that the custom was proved under which Mst. Angrez Kaur could validly marry Sunder Singh, even though her first husband, Tarlok Singh, was alive, and, consequently decreed the suit. Gurdit Singh appellant has now come up to this court against this decree of the High Court by special leave.
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> As is clear from the facts narrated above, the only issue that arise in this case was whether respondent No. 1, Mst. Angrez Kaur, had succeeded in proving the existence

> of a custom in the community to which she belonged, according to which Tarlok Singh, her first husband, could divorce her, whereupon she was at liberty to enter into valid marriage by Chadar Andazi with Sunder Singh, whose party is now under dispute. The parties are residents of the District of Jullundur where, according to Gurdit Singh appellant, no such custom, as claimed by respondent No. 1 exists amongst the Jats, which is the caste to which the parties belong. To urge this point, learned counsel for the appellant relied before us on 'The Digest of Customary Law' by Sir W. H. Rattigan, and on the 'Riwaj-i-am' recorded at the time of the settlement in 1885 and 1914-15. It was argued that Rattigan's Digest of Customary Law in the Punjab had always been treated as an authoritative exposition of the customs prevailing in the Punjab and had been accepted as such by the Privy Council as well as other Courts in India. Reliance was placed on para 72 at page 471 of the 14th Edition of Rattigan's 'Digest of Customary Law', where it is stated that "amongst Muhmadans of all classes a man may divorce a wife without assigning any reason; but this power, in the absence of a special custom, is not allowed to Hindus, nor to females of any class". In paragraph 74, he proceeds to lay down that "until the former marriage is validly set aside, a woman cannot marry a second husband in the life-time of her first husband; " and in paragraph 75, it is stated that "A 'Karewa' marriage with the brother or some other male relative of the deceased husband requires no religious ceremonies, and confers all the rights of a valid marriages."

The marriage claimed by respondent No. 1 with Sunder Singh was described as a 'karewa' marriage. On the basis of the principles laid down in the above paragraphs, it was urged that it should be held that respondent No. 1 could not have entered into a valid marriage with Sunder Singh, while her first husband, Tarlok Singh, was alive. It is, however, to be noted to the general rule and recognises the fact that, if there be a special custom, divorce can be restored to even by Hindus.

In earlier paragraphs of his book, Rattigan has dealt with existence of special customs in the Punjab and, in dealing with the Jats, he expressed the view that, as regards Jats, and specially Sikh Jats who hold very liberal views on questions relating to marriage and whose notions of sexual morality are lax, it will be difficult to enunciate any general principles as are opposed to public policy. Then, he goes on to say that custom in the Punjab is primarily tribal and not local, though the custom of a particular tribe may and often does differ in particular localities. Rattigon's conclusion is expressed by saying that it seems to be clear that there is no uniform custom applicable to the whole of the Punjab. Custom varies from time to time and from place to place.

It is in this background that we have to consider further remarks recorded by Rattigan in paragraph 72 mentioned above, where he says that, in one case, it was doubted whether, in Jullundur District, a Hindu Jat can divorce his wife. He also noticed a number of decisions relating to divorce in the surrounding districts in which it was held that the custom of divorce prevailed in almost identical terms in those districts. This custom according to him, is that the husband is entitled to turn out his wife and, if he does so, she is entitled to re-marry. It was on the basis of these observations of Rattigan that it was urged before us that the High Court committed an error in relying on the circumstance that, in a number of surrounding districts, it was found that the custom of divorce amongst the Hindu Jats so prevalent could lead to an inference that a similar custom prevailed in the district of Jullundur also. In Rattigan's book, by itself, we are unable to find any proposition laying down that, in the district of Jullundur, there is any custom among Hindu Jats permitting divorce as claimed by respondent No. 1. In fact, Rattigan leaves the question open by saying that it has been doubted whether such a custom exists in the Jullundur District. He also mentions the Riwaj-i-am of

Jullundur District, but does not attach much importance to it on the ground of its being unreliable. Rattigan's book on 'Customary Law', in these circumstances, appears to us to be of little help in arriving at a conclusion about the existence of a custom on divorce amongst the Jats in Jullundur District.

The only other document relating to Jullundur District available was the Riwaj-i-am of that district and learned counsel for the appellant placed great reliance on it. He drew our attention to the decision of their Lordships of the Privy Council in Kunwar Basant Singh v. Kunwar Brij Raj Saran Singh (1) where their Lordships held :

> "The value of the Riwaj-i-am as evidence of customary law is well established before this Board; the most recent decision is Vaishno Ditti v. Rameshri (1), in which the judgment of the Board was delivered by Sir John Wallis, who states :
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> "It has been held by this Board that the riwaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instances."

Reliance was also placed upon the principle laid down by this Court in Mahant Salig Ram v. Musammat Maya Devi (2), where this Court held :

> "There is no doubt or dispute as to the value of the entries in the Riwaj-i-am. It is well settled that though they are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case."

The Court also approved of the principle laid down by the Lahore High Court, indicating the circumstances in which Riwaj-i-am can be held to prove a custom, and in that connection said :

> "It has been held in Qamar-ud-din v. Mt. Fateh Bano (3) that if the Riwaj-i-am, on which reliance is placed, is reliable and trustworthy document, has been carefully prepared, does not contain within its four corners contradictory statements of custom, and in the opinion of the Settlement Officer is not a record of the wishes of the persons appearing before him as to what the custom should be, in those circumstances the Riwaj-i-am would be a presumptive piece of evidence in proof of the special custom set up therein. If, on the other hand, the Riwaj-i-am is not a document of the kind indicated above, then such a Riwaj-i-am would have no value at all as a presumptive piece of evidence."

It is in the light of these principles that we have to examine the value to be attached to the Riwaj-i-am in Jullundur District which has been relied upon by learned counsel for the appellant.

The Riwaj-i-am of Jullundur District appears in the form of questions and answers and an extract of it has been placed before us. In answer to the questions about the grounds on which a wife may be divorced, whether change of religion is a sufficient cause and whether a husband may divorce his wife without assigning any cause, the record states that among all Muhammadans except Rajputs - - the Muhammadan Law is followed; and a husband can divorce his wife without assigning any reason. Among the Muhammadan Rajputs and all Hindus - - no divorce is recognised. But an

exception is mentioned that the Kambohs of the Nakodar Tahsil also divorce their wives. They are not required to assign any cause. In answer to the question as to what are the formalities which must be observed to constitute a revocable or an irrevocable divorce, is was stated that among Hindus there is no divorce except among Kambohs of the Nakodar Tahsil who give 'talaq' by executing a written deed.

Reliance is placed on the entry in the Riwaj-i-am that the custom of divorce among Hindu does not exist in the Jullundur District to urge that the High Court wrongly held that respondent No. 1 could be divorced by her first husband, Tarlok Singh, and could validly marry Sunder Singh by Chadar Andazi. It, however, appears that the Riwaj-i-am of Jullundur District is unreliable, and, according to the principle laid down by this Court in the case of Mahant Salig Ram (1), such a Riwaj-i-am cannot be held to prove that there was no custom of divorce among Hindus in this district. It does not appear necessary to refer to the various decisions of the Lahore High Court on the question of unreliability of the Riwaj-i-am of Jullundur District. It is enough to quote the latest decision of the East Punjab High Court in Mohammad Khalil and Another v. Mohammad Bakhsh (2). In that case, Bhandari, J., delivering the judgment of the Bench, reproduced the principle laid down by the Lahore High Court in Qamar-ud-Din & Others (3), which was later approved by this Court in the case of Mahant Salig Ram (1). and then proceeded to hold :-

> "Unfortunately, the Riwaj-i-am of the Jullundur District cannot be regarded as a reliable or trustworthy document, for, it has been held in a number of decided cases, such as Zakar Hussain v. Ghulam Fatima (4), Ghulam Mohammad v. Balli (5), and Mt. Fatima v. Sharag Din (6), that it has not been prepared with care and attention. It seems to me, therefore, that it is impossible to accept the statements appearing therein at their face value."

Learned counsel for the appellant, however, urged before us that all these cases, in which Riwaj-i-am of Jullundur District was held to be unreliable, related either to the custom about the right of succession to property of a daughter against collaterals or about the right to execute wills and gifts. None of these cases related to the custom of divorce and at least, insofar as it records that there is no-custom of divorce amongst Hindus in this district, the Riwaj-i-am should be accepted. There are two reasons why we must reject this contention. The first is that the Riwaj-i-am having been found unreliable in respect of two customs, the inference clearly follows that it was not drawn up carefully and correctly and, consequently it would not be safe to rely even on other aspects of the Riwaj-i-am. The second, and which is the more important reason, is that, in this particular case which is before us, the evidence tendered by both the parties shows that this Riwaj-i-am has incorrectly recorded the custom about the right of a Hindu husband of this district to divorce his wife.

Respondent No. 1, in order to prove her case as to existence of the custom, has primarily relied on two pieces of evidence. The first piece of evidence consisted of the Riwaj-i-am of the neighbouring districts where there was a clear record that the custom of divorce among Hindu Jats existed. The existence of custom of divorce in the neighbouring district, which surround the Jullundur District all around, is certainly a relevant consideration for an inference that such a custom may be prevalent in the Jullundur District also, particularly in view of the Rattigan's opinion that the custom is primarily tribal though also local. If the custom existed among the tribes of Hindu Jats in all the districts surrounding the district of Jullundur, it is probable that a similar custom exists in the district of Jullundur also. The other piece of evidence relied upon was the statements of a number of witnesses examined to prove that not only such a custom existed, but also that instances were available showing that there had been divorces in recent times. Respondent No. 1 has examined nine

witnesses in this behalf. The learned District Judge, in his report, did not place full reliance on the testimony of these witnesses, but their evidence has been accepted by the High Court. On behalf of the appellant also, a number of witnesses were examined to prove non-existence of a custom of divorce. It, however, appears that the appellant's own witnesses belied his case. Several of those witnesses clearly admitted that in this district a custom did exist permitting a husband to divorce his wife. Three of the witnesses, Bhag Singh, Karam Singh and Kartar Singh, who were examined on behalf of the appellant, in their examination-in-chief itself, mentioned a custom under which Zamindar could divorce his wife, though they added that, if the husband divorces his wife, the wife cannot contract Chadar Andazi during the life-time of her husband. Ujagar Singh, another witnesses, in his cross-examination clearly admitted that the husband can divorce his wife, but a wife cannot divorce her husband. He can divorce her both verbally as well as in writting. Similarly, Niranjan Singh, another witness, stated that a husband can divorce his wife, but a wife cannot divorce her husband. Gurdit Singh, in his examination-in-chief, mentioned that a husband and wife could live separate from each other and, in such a case, the could not contract Chadar Andazi during the life-time of her first husband, and added that, if she contracted Chadar Andazi, she could not inherit the property of her second husband. In cross-examination, he stated that "there is no custom among us for divorcing the wives with mutual consent". All these witnesses examined on behalf of the appellant himself thus proved the existence of a custom under which a Hindu Jat in the district of Jullundur could divorce his wife, though all of them added a qualification that, in case a wife is divorced by a Hindu husband, she is not entitled to a second marriage during the life-time of her first husband. They all admit that a custom permitting Hindu Jat to divorce his wife does actually exists in the district of Jullundur. Some of them, at some stages of their evidence, tried to distinguish the right of a husband by saying that he could desert his wife or that there could be a separation between the husband to divorce his wife. Thus, the record in the Riwaj-i-am that there is not such custom of divorce among the Hindus of Jullundur District, is proved to be incorrect not only by the evidence of the witnesses examined on behalf of the respondent No. 1, but even from the evidence given by the witnesses of the appellant. In these circumstances, we hold that there is no force at all in the submission of the learned counsel that this Riwaj-i-am could be held to be reliable insofar as it records the absence of the custom, on the mere ground that in earlier cases the unreliability of this Riwaj-i-am was found in regard to record of customs relating to other matters.

There is no doubt that the witnesses examined on behalf of the appellant, while admitting the existence of a custom permitting a Hindu husband to divorce his wife, have added a qualification that, if such a divorce is brought into effect by a husband, the wife cannot legally contract a second marriage during his life-time. This limited custom sought to be proved by these witnesses does not find support from Riwaj-i-am, nor is it in line with the principles laid down by Rattigan in his book on 'Customary Law'. All that he stated in paragraph 74 of his book was that "until the former marriage is validly set aside, a woman cannot marry a second husband in the life-time of her first husband. " We have already held that, even according to the witnesses examined by the appellant, a custom exists which permits a valid divorce by a husband of his wife and that would dissolve the marriage. On the dissolution of such a marriage, there seems to be no reason why the divorced wife cannot marry a second husband in the life-time of her first husband. It also appears to us incongruous to accept the proposition put forward on behalf of the appellant that, though a wife can be divorced by her husband, she is not at liberty to enter into a second marriage and thus secure for herself means for proper living. In these circumstances, the High Court committee no error in accepting the evidence given by witnesses examined on behalf of respondent No. 1 who stated that the custom as prevailing in the Jullundur District not only permitted divorce, but also recognised the validity of a second marriage of the divorced wife even in the life-time of her first husband. The

High Court was further right in relying on the instances proved by the evidence of these witnesses of respondent No. 1 showing that a number of divorced wives had actually contracted second marriages in the life-time of their husbands and these marriages were recognised as valid marriages by the members of their community.

The appeal, consequently, fails and is dismissed with costs.

G. C. Appeal dismissed.

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